Office - Supreme Court, U. S.
FILED
SEP 24 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 456

CLAUDE C. LONG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

EDWARD A. CUNHA,
WILLIAM F. HERRON,
Flood Building, San Francisco, California,
JOHN J. TAAFFE,
Phelan Building, San Francisco, California,
HERBERT W. ERSKINE,
625 Market Street, San Francisco, California,
Attorneys for Petitioner.

Subject Index

Page

Petition for Writ of Certiorari to the Supreme Court of the State of California 1

Summary and Short Statement of the Matter Involved..... 1

Statement Particularly Disclosing the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question..... 5

Statement of the Grounds Upon Which It Is Contended the Questions Involved Are Substantial..... 7

The Stage of the Proceedings and the Manner in Which the Federal Questions Were Raised..... 8

Reasons Relied Upon for Allowance of Writ..... 9

Brief in Support of Petition for Writ of Certiorari..... 11

I.

Date of judgment of trial court..... 11

II.

The opinion of the court below..... 11

III.

Date of judgment of Appellate Court..... 12

IV.

The jurisdiction 12

V.

Statement of grounds of jurisdiction and statement of the case 12

VI.

Specification of errors 13

VII.

Argument 13

Summary of argument 13

(I)

Whether the abortion performed by petitioner was necessary to save the life of the deceased, was a clinical question which could be solved by expert testimony alone,

Page

and therefore expert testimony was the only means by which petitioner could establish his innocence..... 14

(II)

By giving the instruction complained of, the trial court violated petitioner's right to due process of law..... 15

(III)

The Supreme Court of California, by upholding the giving of the instruction, has denied to petitioner the equal protection of the laws..... 16

Conclusion 19

Table of Authorities Cited

Cases	Pages
Brewer v. Ring, 177 N. C. 476, 99 S. E. 358	14
Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979	6
Cunha, In re, 123 Cal. App. 625, 11 Pac. (2d) 902	16
Edwards v. Uland, 193 Ind. 376, 140 N. E. 546	14
Galpin v. Page, 18 Wall. 350, 21 L. ed. 959	16
Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A. L. R. 1102	6
Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383	7
Hovey v. Elliott, 167 U. S. 409	16
Jaeger v. Stratton, 170 Wis. 579, 176 N. W. 61	14
Keerl v. Montana, 213 U. S. 135, 29 S. Ct. 469, 53 L. ed. 634	6
McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696	16
Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A. L. R. 406	6
Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265	6
Nicholas v. Jacobson, 113 Cal. App. 382, 298 Pac. 505	14
Patterson v. Marcus, 203 Cal. 550, 265 Pac. 222	14
Pearson v. Crabtree, 70 Cal. App. 52, 232 Pac. 715	17
People v. Long, 103 Pac. (2d) 969	2
Postal Telegraph Co. v. Adams, 155 U. S. 689	16
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527	7
Schumacker v. Murray Hospital, 58 Mont. 447, 193 Pac. 397	14
State v. Dunklebarger, 206 Iowa 971, 221 N. W. 592	15
Tuney v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243	6
Whitney v. California, 274 U. S. 357, 47 S. Ct. 241, 71 L. ed. 1095	8

Codes and Statutes

	Pages
California Constitution, Article VI, Section 4c	5
Judicial Code, Section 237	5, 12
Penal Code, Section 1176	8
United States Constitution, Fourteenth Amendment	2, 5
U. S. C. A., Title 28, Section 344, subd. b	5, 12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

CLAUDE C. LONG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Claude C. Long for a Writ of Certiorari to the Supreme Court of the State of California, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The federal question presented: Is the denial to the accused in a criminal case of the right to prove his

innocence a deprivation of the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment?

We adopt, for the purpose of this petition, the following excerpts from the opinion of the State Court, *People v. Long,* 103 Pac. (2d) 969:

> "Appellant, Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter * * *" (Appendix, page 1.)
>
> "* * * **The main theory of the defense was that the operation was necessary to preserve the life of the deceased;** that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition." (Appendix, page 8.)
>
> **"There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis**—that is, the mitral valve of the heart had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when

it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

"In support of his defense, Dr. Long testified that the deceased first visited him in March of 1937; that he had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time she was pregnant; that he formed the opinion at that time that if she were pregnant an abortion was necessary to preserve her life; * * *

"It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. **Her symptoms were then such that, coupled with the doctors' clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion.** It was later discovered she was not then pregnant, so that no abortion was required."

Following his conviction, petitioner appealed to the District Court of Appeal of the State of California for the First Appellate District, which reversed the judgment because the trial court gave the following instruction to the jury on the subject of expert testimony:

> "(1) Duly qualified experts may give their opinions on questions in controversy at a trial to assist the jury in deciding such questions. The jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.
>
> "(2) You are instructed that in considering the expert testimony which has been offered in this case, you should weigh it with all the other evidence in the case; you are not bound to determine any fact in accordance with the opinion of such expert, if not convincing to your mind.
>
> "(3) You are instructed that you may regard the testimony of an expert as merely **advisory,** and you are instructed that **you may disregard altogether the testimony of such expert,** and you may **form your own conclusions** from all the evidence submitted to you.
>
> "(4) After considering all these things, and any other circumstances in evidence, you are to give such testimony such weight as you, in your judgment, think it is entitled to, and if convincing and carrying with it a belief in its truth, act upon it; if not, you may and you have a right to reject it."

The District Court of Appeal says of this instruction:

> "It contains almost identical language to that held to be erroneous in Hirshfeld v. Dana, 193 Cal. 142 (223 Pac. 451), and to be reversible error in Pearson v. Crabtree, 70 Cal. App. 52 (232 Pac. 715). We could add nothing to what was said concerning this instruction in these two cases. Whatever may be the value of expert testimony in some cases, in this case, the question of the presence or absence of due caution and circumspection, in the nature of things, could be largely proved or disproved only by expert testimony—**it was the only means open to defendant in presenting his defense.**"

Exercising the power conferred upon it by the Constitution of the State of California (Section 4c, Article VI), the Supreme Court of the State of California granted a petition of the Attorney General for a hearing after judgment in the District Court of Appeal, and thereafter in a *per curiam* opinion, affirmed the judgment. Mr. Justice Carter, in a lengthy dissenting opinion, **held that the giving of the instruction constituted a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.** (Appendix, page 32.)

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(a) The statutory provision believed to sustain the jurisdiction is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

(b) The date of the judgment of the Supreme Court of California sought to be reviewed—June 27, 1940; rehearing denied—July 25, 1940.

That the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, is apparent from the language heretofore quoted from the majority opinion of the Supreme Court of California, the dissenting opinion of Mr. Justice Carter, and the opinion of the District Court of Appeal. To comply with the requirements of Rule 12 (Par. 1) of this Court as we construe the same, we append hereto copies of the opinion of the State Court delivered upon the rendering of the judgment sought to be reviewed, with the earlier opinions in the same case, to-wit, the original opinion of the District Court of Appeal and its opinion denying a rehearing.

The cases believed to sustain the jurisdiction are, in part, as follows:

Keerl v. Montana, 213 U. S. 135, 29 S. Ct. 469, 53 L. ed. 634;

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. ed. 979, 986;

Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102;

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A. L. R. 406;

Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265;

Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243;

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 18 S. Ct. 383;
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The instruction given by the trial court, heretofore quoted, deprived the petitioner, as pointed out in the opinion of the District Court of Appeal, of the only evidence by which he could prove his defense that the operation was necessary to preserve life, this defense being one which could be proven by expert testimony only.

The trial court, by leaving it to the caprice of the jury to disregard expert testimony, deprived petitioner of his right to due process of law. The courts of California and, so far as we are advised, of every other jurisdiction, have applied in civil cases the rule that the necessity and propriety of medical and surgical treatment are, except in a very limited class of cases of which this is not one, questions that can be determined by expert testimony alone; and the Supreme Court of California, by applying a different rule in criminal cases, has deprived petitioner of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

These questions, we submit, are substantial.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

The instruction of the trial court heretofore quoted appears in Volume II of the typewritten record, page 1389, line 16 to page 1390, line 8, inclusive. This instruction was given by the Court on its own motion and is the first appearance of the federal question in the record. The California statute (Penal Code Section 1176) provides that "when the charge of the court has been taken down by a reporter, the questions presented in such instructions or charge need not be excepted to or embodied in a bill of exceptions * * * and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions".

On the motion for new trial, the federal question was raised. (Reporter's Transcript Vol. II, page 1429.) That the contention that the instruction constituted a deprivation of due process of law and of the equal protection of the laws was raised both in the briefs filed in the District Court of Appeal and in the petition for a rehearing presented to and denied by the Supreme Court of the State of California, appears from the certificate of Chief Justice Gibson, the last document in Vol. II of the record. As the briefs are no part of the record, and as the opinion of the majority of the Court does not discuss the federal question, it was necessary to resort to such a certificate to show that the federal question was actually presented to, and acted upon, by the State Court. (See *Whitney v. California,* 274 U. S. 357, 47 S. Ct. 241, 71 L. ed. 1095.) Moreover, the federal question is discussed in Justice Carter's dissent. (Appendix, page 32.)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided federal questions of substance not heretofore determined by this Court, and has decided them in a way probably not in accord with the applicable decisions of this Court for the reasons heretofore stated of the grounds upon which it is contended the questions involved are substantial, and which need not be repeated.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of, and under the seal, of this Honorable Court, directed to the Honorable Justices of the Supreme Court of the State of California, commanding them to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above, and that the said judgment of the Supreme Court of California may be reviewed by Your Honors and the judgment thereof reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem meet, just, and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
September 11, 1940.

EDWARD A. CUNHA,
WILLIAM F. HERRON,
JOHN J. TAAFFE,
HERBERT W. ERSKINE,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 11, 1940.

HERBERT W. ERSKINE,
Of Counsel for Petitioner and Member of the Bar of the Supreme Court of the United States.